

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

ALIU KAYODE ALABI,

Plaintiff,

v.

1:18-cv-00931-SCY-LF

SONNY PERDUE, and
UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendants.

ORDER DENYING APPLICATION FOR ENTRY OF DEFAULT

THIS MATTER comes before the Court on plaintiff Aliu Kayode Alabi's Application for Entry of Default filed December 12, 2018 (Doc. 9). The Court, having reviewed the application and the record in this case finds that the application is premature and will DENY it.

Plaintiff initiated this law suit on October 4, 2018, by filing his original complaint. Doc. 1. The Clerk's Office issued a summons as to Sonny Perdue on October 4, 2018. On October 12, 2018, before defendants had filed a responsive pleading, plaintiff filed a motion to amend his complaint. Doc. 6. The Court granted plaintiff's motion to amend. Doc. 7. Plaintiff filed his amended complaint on October 22, 2018. Doc. 8. Defendants have not filed a responsive pleading.

In his application, plaintiff advises the Court that "[d]efendant was served on October 10, 2018 through USP even though it received awareness [on] October 8, 2018." Doc. 9 at 1. Plaintiff contends that defendants failed to "answer, plead or otherwise defend against the action in a timely manner." *Id.* Although plaintiff may have served his original complaint, there is no indication in the record that plaintiff has served the amended complaint on defendants. "An amended complaint supersedes the original complaint and renders the original complaint of no legal effect." *Franklin v. Kansas Dep't of Corr.*, 160 F. App'x 730, 734 (10th Cir. 2005) (citing *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir.1991); *Gilles v. United States*, 906 F.2d 1386, 1389 (10th Cir.1990)). With respect to a response to an amended complaint, "unless the court

orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days **after service** of the amended pleading, whichever is later.” FED. R. CIV. P. 15(a)(3). The Court also notes that specific rules apply to serving the United States and its agencies and officers. *See* FED. R. CIV. P. 4(i).

Because plaintiff served his original complaint on October 10, 2018 (and assuming the United States was properly served), defendants had through December 9, 2018, in which to respond to plaintiff’s original complaint. FED. R. CIV. 12(a)(2). In the meantime, however, plaintiff filed his amended complaint on October 12, 2018. Doc. 8. There is no indication in the record that plaintiff has served the amended complaint on defendants. Defendants are under no obligation to file a response until after plaintiff serves the amended complaint. Accordingly, the application for an entry of default is premature and is DENIED.

IT IS SO ORDERED.



Laura Fashing
United States Magistrate Judge